STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 20, 2001
v	No. 217281 Leelanau Circuit Court
WILLIAM EMERY LEBLANC, Defendant-Appellant.	LC No. 98-00959-FH

Before: Fitzgerald, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of third-degree criminal sexual conduct, MCL 750.529d(1)(a); MSA 28.788(4)(1)(a). He was sentenced to six to fifteen years' imprisonment and appeals as of right. We reverse.

The victim alleged that on a Sunday in May 1997, defendant, her stepfather, picked her up from work, drove her to a gravel road, and had sexual intercourse with her. The victim identified possible Sundays during that month as the day of the assault. Defendant testified that on one of the alleged dates, he worked from 7:00 a.m. to 3:00 p.m., then took his wife, the victim's mother, out to dinner for Mother's Day. He could not recall where they ate dinner that day. On another alleged date, May 18, 1997, defendant testified that he worked from 7:00 a.m. to 3:00 p.m., then went golfing with his uncle and father from 4:00 p.m. to 7:00 p.m. Defendant denied picking the victim up from work on either of the above dates. On May 25, 1997, defendant also worked from 7:00 a.m. to 3:00 p.m. He denied picking up the victim from work on this date. Defendant admitted to picking the victim up from work on occasion, but generally did not do so because he believed that the victim should obtain work closer to home. In July 1997, the victim did change jobs. Defendant drove the victim to work one day after the job change. During the ride, he told her that he would be responsible for determining her punishment from then on. Previously, defendant and the victim's mother, defendant's wife, would discuss, outside the victim's presence, appropriate punishment. Shortly after this discussion, on July 17, 1997, defendant learned of the allegations against him. Defendant denied having sexual relations with the victim.

The victim was in counseling due to behavioral problems.[1] She alleged that her mother began to date defendant almost immediately after the death of her biological father. The victim wrote letters indicating that she hated both defendant and her mother. However, all of the letters were not submitted to the jury because of the defense's failure to provide the evidence to the prosecutor prior to trial.[2] While the victim could not identify the exact date of the offense, she knew that it was a Sunday in May 1997, and it was light outside at the time of the assault. Specifically, the act occurred after defendant picked the victim up from work. However, the victim gave varying accounts of the incident. On one occasion, she indicated that defendant picked her up, assaulted her, then drove her home. On another occasion, she indicated that she returned to work following the assault. On May 11, 1997, the victim worked from 12:17 p.m. to 3:31 p.m., then returned to work, following a break, from 4:02 p.m. to 7:44 p.m. On May 18, 1997, the victim worked from 9:46 a.m. to 3:37 p.m. Finally, the victim worked from 4:48 p.m. to 10:51 p.m. on May 25, 1997. The victim agreed that the offense did not occur on May 25, 1997, because it would have been dark outside when defendant picked her up. However, she refused to rule out May 11, 1997, as the date of the offense. While the victim testified that she had to wait five minutes for defendant to pick her up, and the assault took place at a location five to ten minutes[3] from work, she testified that thirty-one minutes was sufficient time for the incident to have occurred. The assault allegedly only lasted five to ten minutes.

The victim testified that she did not report the abuse because of her embarrassment and her belief that she was at fault. At one point though, the victim testified that defendant did not use a condom[4] during each sexual act. The victim testified that, if she got pregnant, her mother would learn of the abuse. She did not seem to be concerned about getting pregnant and stated that if she became pregnant, it would be defendant's fault. Defense counsel questioned the

[1] The victim allegedly got into a fight with her biological father and told him that she wished he would die. Her biological father suffered a heart attack and did die. The victim initially welcomed defendant into the family, but as defendant and the victim's mother began to plan their wedding, behavioral problems began and increased as the wedding day approached.

[2] The trial court ruled that the evidence was not admissible, but that it would revisit the issue if the information was known to the prosecutor. There is no indication that defense counsel attempted to revisit this issue despite the trial court's conditional ruling. The letters contradicted the victim's testimony that she merely "disliked" defendant and did not hate him. The letters indicated that she hated defendant and did not like her parents discipline of her for acts such as theft. At the evidentiary hearing, trial counsel acknowledged that the letters were excluded because of his failure to provide them to the prosecutor. However, he also alleged that he made a strategic determination not to seek admission at trial. We question the validity of the assertion in light of the content of the letters. This failure does not control the disposition of this case, but is another indication of the inadequate preparation by trial counsel.

[3] During trial, a police officer drove the victim to the area of the alleged assault. She identified two possible locations where the assault may have occurred. The first location was an eleven to twelve minute drive and the second location was a thirteen to fourteen minute drive.

[4] The victim testified that defendant kept condoms in his dresser drawer. However, police were unable to find condoms during a search of the home. The victim's mother testified that she told police that if there were condoms in the home, "he [defendant] did it." The couple did not use condoms because of a tubal ligation.

victim about what she was told about abuse by her counselor, Barbara Lynne Cross. Defense counsel explained that he believed that the victim was "coached" into describing sexual abuse symptoms and wished to explore this area with both the victim and Cross. However, defense counsel never explored the issue of "coaching" with Cross. The victim testified that she did not "hate" defendant, but she did "dislike" him. The victim testified that she wanted to live with her mother and brothers. This testimony was contrary to the letters written by the victim wherein she expressed her hatred of both defendant and her mother and her desire to be placed in foster care. Additionally, the victim testified that she was frequently grounded for "stupid" acts such as arguing or taking a sucker from her brother. Defendant would then offer to "unground" the victim if she engaged in sexual acts with him. However, the victim admitted that she was also grounded for acts of theft, poor school grades, and an alcohol incident.

Defendant raises various arguments in support of reversal of his conviction. We conclude that the cumulative effect of errors of defense counsel require reversal and remand for a new trial. To establish a claim of ineffective assistance of counsel, the defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness and was so prejudicial that the defendant was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must overcome the presumption that the challenged action was trial strategy and also establish a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). When reviewing a claim of ineffective assistance of counsel based on counsel's performance, the question is whether counsel's actual performance undermines confidence in the reliability of the result. *People v Mitchell*, 454 Mich 145, 155; 560 NW2d 600 (1997). The decision to call witnesses is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). To overcome the presumption of sound trial strategy, the defendant must show that the failure to call witnesses deprived him of a substantial defense. *Id*. "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Following a complete review of the record, we conclude that trial counsel's performance undermines confidence in the reliability of the result. *Mitchell, supra*. There were no witnesses to the alleged sexual acts although some of the alleged acts occurred at public locations.[5] Consequently, a determination of defendant's guilt would be based on the credibility of the testimony of defendant and the victim. To buttress their case, the prosecution called Cross as an expert in treating teenage sexual abuse victims. Cross testified that, in her research and experience, victims will not report abuse because of feelings of embarrassment and fault for allowing the abuse to occur. Cross also testified that victims frequently are torn about reporting the abuse because they love the offending person and do not wish to upset a non-offending adult in the home. Finally, she opined that victims also fail to report or delay reporting abuse because

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[5] Defendant was only charged with one count of criminal sexual conduct for the incident that allegedly occurred in defendant's truck off the side of a road after he picked the victim up from work. However, the victim testified to inappropriate groping, one act of oral sex, and six to nine penetrations over the years. The victim's statements regarding the number of penetrations also varied.

of fear of tearing the family apart. On cross-examination, Cross testified that her conclusions regarding sexual abuse were based on studies. While she had named authors of studies that she had read, Cross did not correlate the statistic to the author or the study. She also opined that the "symptoms" were experienced by at least eighty to one hundred percent of victims, depending on the "study" or other factors.

At the evidentiary hearing on remand, trial counsel[6] testified that he failed to call an expert to combat the testimony of Cross because he did not want the case to be reduced to a competition of experts. However, trial counsel's testimony, that the decision to not call an expert was strategic, is belied by the record. Barbara Jones Smith testified that she was a clinical psychologist specializing in the assessment and treatment of sexual victimization and perpetration. She was subpoenaed for trial. In response to the subpoena, Smith called one of the two defense attorneys to inquire about the nature of her testimony. Smith was advised that the primary defense attorney was handling that aspect of the trial. However, the primary defense attorney never called her to interview her about her potential testimony. Furthermore, Smith counseled a "family member," specifically the victim, but never released the counseling records because she never received clarification regarding authorization for release. Finally, Smith called secondary defense trial counsel the day before trial was to commence. At that time, Smith was advised that there was an emergency family matter involving secondary defense counsel, and she would not be called at trial. Accordingly, the allegation that the failure to call this witness was strategic is illogical. There could be no determination regarding the need and importance of Smith's testimony because an assessment of her potential testimony did not occur.

At the evidentiary hearing, Smith testified that she reviewed the trial testimony of Cross and would have been able to impeach her testimony. For example, while Cross represented that she was a member of the Association for Treatment of Sex Abusers, Cross was not a member and was asked to stop her representations. More importantly, Smith also testified that Cross improperly identified eight symptoms of sexual abuse. Furthermore, Smith disputed Cross' allegations that the "symptoms" experienced by the victim were supported by the high statistical percentages recited by Cross. Smith was unaware of any such studies and was familiar with the authors named by Cross as researchers who had compiled various studies. For example, while Cross named Bill Marshall as a person whose studies she was familiar with, his studies did not involve victimization, but dealt with offenders. Additionally, the other authors named by Cross did not deal with victim symptom percentages, but addressed proper protocol when interviewing children who alleged sexual abuse. Smith concluded that the proper manner of citation to a study involved listing the author, article name, population involved, year of publication, and application to the population. Of the three authors named by Cross, none of them reached the percentages alleged by Cross.

We acknowledge that Cross never gave an opinion regarding whether the victim had been abused by defendant. However, the victim testified regarding her feelings following the abuse

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[6] At the evidentiary hearing, trial counsel agreed, in accordance with the affidavit filed, that there were deficiencies in trial performance. At times however, he did testify that some of the deficiencies *also* had a plausible basis.

and why she did not report the allegations. Cross testified, on *cross-examination*, that the overwhelming percentage of victims evaluated in statistical studies essentially corroborated the victim's behavior following sexual abuse. There was no foundation provided for these studies. Defense counsel did not object to the testimony or ask that it be stricken, but rather, continued to *elicit* further damaging testimony from Cross that did not have a foundation. In light of the inadequate preparation of trial counsel in failing to interview and obtain *the victim's counseling records* from Smith to determine the value of her testimony and her ability to impeach Cross, our confidence in the reliability of the result has been undermined, *Mitchell*, *supra*, and a new trial based on ineffective assistance is warranted.

Trial counsel's performance was also deficient during the voir dire of the jury. Despite the fact that defendant was a Native-American tribal officer, there was no inquiry into the jurors' bias or prejudice against police officers or Native-Americans.[7] At the evidentiary hearing, defendant was able to present testimony and newspaper articles to indicate that bias or prejudice exists against Native-Americans in the community where defendant's trial occurred. Furthermore, while defendant's race was Native-American, the victim was his Caucasian stepdaughter. Generally, a trial court should, upon request, ask prospective jurors about racial prejudice. *Ham v South Carolina*, 409 US 524, 527; 93 S Ct 848; 35 L Ed 2d 46 (1973); *People v Wray*, 49 Mich App 344, 346; 212 NW2d 78 (1973). However, even when requested, an inquiry into racial prejudice is constitutionally required only where race is a bona fide issue in this matter. *Ristaino v Ross*, 424 US 589, 594; 96 S Ct 1017; 47 L Ed 2d 258 (1976); *People v Daniels*, 192 Mich App 658, 666-667; 482 NW2d 176 (1992). The mere fact that a complainant and the victim are of different races does not make race a bona fide issue. *Ristaino, supra* at 597; *Carter v Braunstein*, 89 Mich App 119, 122; 279 NW2d 596 (1979). In the present case, defendant has failed to demonstrate that race was a bona fide issue in the case. *Carter, supra*. However, inquiry into any potential bias or prejudice against defendant was crucial where a conviction was based, in large part, on the credibility of the witnesses. While defendant was unable to demonstrate that race was a bona fide issue in the case, we conclude that the failure to inquire into bias or prejudice based on occupation and race undermines the reliability of the verdict. *Mitchell, supra*. Because the jury's verdict was contingent on the credibility of defendant and the victim, any bias or prejudice by the jury could have served as the basis of the verdict.

Our confidence in the reliability of the verdict is also undermined by defense counsel's failure to object to rebuttal evidence and testimony. As a defense to the charge, defendant argued

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[7] During the voir dire, defense counsel did not expressly inquire whether any juror had a bias or prejudice against police officers. Rather, in discussing victimization with one juror, defense counsel noted that a victim has to deal with the "system" that includes prosecutors and police. Defense counsel then noted that because of the manner in which a case may be handled, "you" may or may not feel that prosecutors and police are the greatest people in the world. Defense counsel then asked the juror, who had been a victim of an assault, "I guess in your particular case would you hold that either against the Prosecutor or the Defense or favor one side or the other because of your experience?" Defense counsel did not make inquiry of the venire, in general, regarding bias or prejudice against police officers. Furthermore, there was no inquiry regarding bias or prejudice against Native-Americans.

alibi. Specifically, defendant testified that he was working on the dates alleged, then engaged in other activities following the completion of his shift from work. Defendant was asked, on cross-examination, whether he had ever falsified his daily police logs that recorded his activities while on duty. Defendant answered absolutely not. The prosecutor changed the subject, but later asked the same question and got the same response. The prosecutor then asked if defendant could recall having a conversation about his daily logs. He responded no again. The prosecutor then called Sergeant James Edward Loonsfoot who testified that defendant misrepresented the duration of his lunch on July 28, 1996, on his daily log. While defendant indicated that he had taken an hour lunch, Sergeant Loonsfoot opined that defendant had taken an hour and a half lunch based on his own observation. There was no objection to the testimony of Sergeant Loonsfoot.

MRE 608(b) provides that specific instances of conduct of a witness, for the purpose of attacking credibility, other than conviction of a crime, may not be proved by extrinsic evidence. See also *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 518; 592 NW2d 786 (1999). Once defendant denied falsification of any daily log, the prosecutor was "stuck" with that answer. *Wischmeyer v Schanz*, 449 Mich 469, 477-478; 536 NW2d 760 (1995). Furthermore, there was no dispute, based on the victim's work schedule, that any alleged sexual abuse would have occurred after, not during, defendant's work shift. Therefore, our confidence in the reliability of the verdict in light of defense counsel's failure to object to this specific instance of conduct, coupled with other errors in the trial, require reversal.

Furthermore, the prosecutor, upon receiving defendant's answer that he could not recall any discussions regarding his daily logs, did not attempt to refresh defendant's recollection or impeach defendant with the daily log. MRE 613(b) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or in the interests of justice otherwise require. . . ."

The prosecutor did not attempt to impeach defendant with the daily log or provide it for him to review and explain. Accordingly, the document and testimony should have been excluded where defendant was not given an opportunity to explain any discrepancy. *Lagalo, supra* at 517-518.

Additionally, defense counsel failed to object to the scope of rebuttal testimony. Although defendant and his wife could not definitively state where they had eaten dinner on Mother's Day, a date when the assault alleged occurred, the prosecutor introduced testimony that the couple did not eat dinner at a specific restaurant. The prosecutor did not introduce testimony from every nearby restaurant manager to exclude the possibility that the couple went out to dinner that day. The prosecutor also introduced evidence regarding defendant's report of a missing golf club. The test of whether rebuttal testimony was properly admitted is whether it is responsive to evidence that is introduced or a theory developed by defendant. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). The evidence introduced by the prosecutor was not objected to by defense counsel and was not proper rebuttal testimony. The issues raised by these witnesses were inconsequential and did not impeach the testimony of defendant. Rather, the testimony could have merely served to confuse or cloud the perception of the jury.

The cumulative effect of a number of errors may amount to error requiring reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). After a thorough review of the record on appeal, we conclude that the cumulative effect of counsel's errors undermines the confidence in the reliability of the verdict and a new trial is warranted. *Id*.; *Mitchell*, *supra*.[8]

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ Gary R. McDonald

[8] Contrary to the allegation of defendant, retrial is not precluded based on alleged procedural defects. The order appointing the special prosecutor in this case was signed by the probate judge, acting as a circuit court judge by assignment. The allegations against the appointment of a special prosecutor to investigate the case is also without merit. Defendant cannot collaterally attack the appointment. *People v Davis*, 86 Mich App 514, 522-524; 272 NW2d 707 (1978).